Nevada and Wyoming) for which *no* violations have been established. Here again, if Congress' response is deemed "proportional" to the violations at issue here, that requirement provides no real limit on Congress' power.

That is not to say that any State is, or should be, allowed to discriminate against the disabled with impunity. For example, sovereign immunity does not block suits for money damages or other relief brought by the United States. But the abrogation of sovereign immunity at issue here is neither within Congress' authority under the Fourteenth Amendment nor necessary as a matter of policy.

STATEMENT OF THE CASE

Although *amici* agree with the Statement of the Case by Respondent, State of Georgia, we highlight here a few of the salient facts. Petitioner Tony Goodman, who alleges that he is a paraplegic, raised both Eighth Amendment and ADA claims in the district court. Goodman Pet. App. at 1a-2a. The Eleventh Circuit held that he had stated a claim under the Eighth Amendment for allegations related to excessive restraint, exposure to human waste, and inadequate medical care, and that he therefore can pursue a claim under 28 U.S.C. § 1983 for those alleged violations. *Id.* at 18a-19a.

As to his ADA claims, Petitioner added a variety of other complaints such as being denied access to bathing or showers, adequate heating and ventilation, laundry and cleaning services, college programs, vocational training, recreation, entertainment, television, phone calls, freedom of movement, and religious services. *Id.* at 6a. The Eleventh Circuit held that those claims must be dismissed, relying on its holding in *Miller v. King,* 384 F.3d 1284 (11th Cir. 2004), that "Title II prohibits far more conduct and in many more areas of prison administration than conceivably necessary to enforce the Eighth Amendment ban on cruel and unusual punishment." *Id.* at 1274. As a result, "Title II of the ADA, as applied in this prison case, does not validly abrogate the

States' sovereign immunity and cannot be enforced against the State of Georgia ... in a suit for money damages." *Id.* at 1275-76.

SUMMARY OF ARGUMENT

Although the Court in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), held that Congress could validly abrogate State sovereign immunity in applying Title II in the limited context of access to the courts, extending that holding to the countless functions required to run a State *prison* is entirely different. Critical to the Court's decision in *Lane* was the fact that access to the courts implicated a variety of "fundamental rights" requiring heightened scrutiny which, in turn, allowed for a more expansive view of the congressional evidence, and a more expansive remedy, than would otherwise be permitted under a lesser standard. No doubt for that reason, the Court was careful to limit its holding to that specific context.

What Petitioners propose here is far more sweeping. Rather than apply Title II in a single limited context, Petitioners propose to apply it to every service, program and activity provided by state prisons. In doing so, Petitioners are attempting to pound a very large, square peg into the much smaller round hole left by *Lane*. It does not fit.

Preliminarily, it is important to remember that none of the rights asserted here triggers the heightened scrutiny that was pivotal in *Lane*. Unlike *Lane*, this case involves constitutional rights asserted in prison. Under settled precedent, such claims are generally judged under a deferential "reasonably related" test. *See, e.g., Turner* v. *Safley*, 482 U.S. 78, 89 (1987). Similarly, Eighth Amendment claims require a showing of "*deliberate* indifference" to inmates' suffering, not just a failure to accommodate the needs of various classes of prisoners. *See, e.g., Farmer* v. *Brennan*, 511 U.S. 825, 835 (1994). This Court has never applied strict scrutiny, or even heightened scrutiny, to such claims by disabled prisoners.

As we show below in Section I, the level of scrutiny influences the record of constitutional wrongs that must be shown to justify an abrogation of sovereign immunity. If heightened scrutiny is triggered, then it is "easier for Congress to show a pattern," *Nevada Dep't. of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003), and if not, showing a pattern is all the more demanding. Petitioners have assembled a mass of material to argue that Congress was responding to a "widespread pattern" of States violating the rights of disabled inmates. Yet, as detailed in Georgia's brief, closer inspection shows this material to be comprised largely of examples that either do not involve States, or that arose *after* the ADA, or that simply are not constitutional violations in the first place. Even for States where there is evidence of scattered violations over decades of prison operations, this evidence scarcely establishes any "widespread" pattern. And remarkably, for many States, there is no evidence--or even an allegation--of *any* constitutional violations before the passage of the ADA. See Appendix A. Thus, there simply is no factual predicate for abrogating the States' sovereign immunity.

But even if the record were deemed sufficient to establish *some* limited pattern of constitutional violations, Title II's blanket abrogation of sovereign immunity is not by any stretch a "congruent and proportional" response, as required by *City of Boerne*. Particularly when the rights asserted do not give rise to any heightened scrutiny, it simply cannot be congruent and proportional—if the phrase is to retain any meaning—for States to lose their sovereign immunity when there is no evidence they violated any rights before the ADA was enacted. Nor is it congruent and proportional to deprive a State of that immunity in response to at most a handful of violations over a period of several decades, in comparison to the thousands or even tens of thousands of disabled inmates that a State would typically have housed during that period.

For all these reasons, abrogating the States' sovereign immunity for Title II claims asserted by inmates hardly

constitutes "enforcement" of Fourteenth Amendment rights. It is, rather, an attempt to *redefine* the constitutional rights of disabled prisoners. And, if sustained, it will inevitably mark the end of deference to State prison operations.

ARGUMENT

As this Court has repeatedly held, the States joined the Union "with their sovereignty intact," *Blatchford* v. *Native Vill. of Noatak and Circle Vill.*, 501 U.S. 775, 779 (1991), a "central" feature of which was "immunity from private suits," *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Only under § 5 of the Fourteenth Amendment may Congress abrogate the States' immunity, and only when it acts "to enforce," by "appropriate legislation" the rights guaranteed by that amendment. *See Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 364-65 (2001) (quoting § 5 of the Fourteenth Amendment).

To be sure, Congress has wide latitude under § 5 in choosing how to enforce the Fourteenth Amendment, and "its conclusions are entitled to much deference." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). Congress, moreover, is "not confined to legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel*, 528 U.S. at 81. However, as broad as Congress' power under § 5 may be, "it is not unlimited." *Boerne*, 521 U.S. at 519 (quoting *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970)). Congress is only authorized to enact remedial legislation "to enforce" constitutional guarantees. It cannot "decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* And the history of the Fourteenth Amendment re-enforces that its framers sought to avoid the "dangerous centralization of power" that would result if it became a license to legislate generally. *Id.* at 522 (citation omitted).

While the line between remedial and substantive legislation is not always clear, "the distinction exists and must be observed." *Id.* at 520. Indeed, observing the line is "necessary to prevent the Fourteenth Amendment from

obliterating the Framers' carefully crafted balance of power between states and the National Government." *United States* v. *Morrison*, 529 U.S. 598, 620 (2000).

To draw the line between remedial and substantive legislation, this Court has developed a three-part test. The first step is to "identify with some precision the scope of the constitution right at issue," that is, the "metes and bounds" of the right in question. *Garrett*, 531 U.S. at 365, 368. Second, the Court asks "whether Congress identified a history and pattern of unconstitutional" action to be remedied. *Id.* at 368. Finally, assuming some such "pattern" has been demonstrated, the remedy must be a "congruent and proportional" response to that pattern. *Id.* at 374.

Amici agree with respondent Georgia's analysis of the "metes and bounds" of the constitutional rights at issue here. However, even if the Court were to adopt Petitioners' broad approach to that issue, Congress did not validly abrogate the States' sovereign immunity from suits under Title II because (1) the record does not demonstrate the requisite "history and pattern" of constitutional violations, and (2) in all events, the means Congress chose to address the arguably proven constitutional violations are not a "congruent and proportional" response. It follows that Title II's abrogation of sovereign immunity is not proper "enforcement" of Fourteenth Amendment rights, either under the *Boerne* approach, or under the more restrictive approach outlined in Justice Scalia's dissent in *Tennessee* v. *Lane*, 541 U.S. at 563-65 (2004).

I. The Record Does Not Support The Requisite Finding Of a "History and Pattern" Of States Violating The Constitutional Rights Of Disabled Prison Inmates.

The "history and pattern" portion of the *Boerne* test helps distinguish between "corrective legislation," which is targeted at remedying specific constitutional violations, and general substantive legislation. As shown below, in contrast

to the situation in *Lane*, here the requisite "pattern" cannot reasonably be inferred from allegations (or even limited evidence) of disparate treatment, given that Fourteenth Amendment rights are not subject to strict scrutiny in the prison environment. Moreover, close examination of Petitioners' analysis reveals that, at the end of the day, the evidence of *real* violations of disabled inmates' Fourteenth Amendment rights by the States is exceedingly thin.

A. Unlike The Situation In *Lane*, Constitutional Violations Cannot Be Inferred From Mere Allegations Or Even Evidence Of Disparate Treatment Because Fourteenth Amendment Claims Are Not Subject to Strict Scrutiny In The Prison Setting.

The Court has made clear that the level of constitutional review influences the second part of the *Boerne* test because, if heightened scrutiny is triggered, then it is "easier for Congress to show a pattern of state constitutional violations." *Hibbs*, 538 U.S. at 736. Conversely, where as here the rights asserted do not trigger strict scrutiny, establishing a widespread pattern requires more exacting evidence than in cases such as *Hibbs* or *Lane*.

1. As to the rights at issue, Petitioners here assert not only the Eighth Amendment claims actually raised in this case, but also what the government calls a "cluster" or "constellation" of hypothetical claims that might arise in the many contexts involved with running a prison.[1] Pet'r Br. at

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[1] While Petitioners allude to a denial of access to the prison law library or religious services, there are no specific factual allegations as to either. While *Lane* considered a variety of fundamental rights, they were all related to a single limited context–access to actual courthouses. Here, on the other hand, petitioners seek to invoke rights that touch on numerous different features of prison life. For example, the law library is an entirely different context from the prison chapel or medical services. And as such, the rights that petitioners assert here far exceed the "metes and bounds" of the single context in *Lane*.

16-17; Gov't Br. at 14-15. Petitioners then argue for heightened scrutiny for all of these rights because prisons "exert a degree of control unparalleled in society." Pet'r Br. at 14 (quoting *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 121-22 (2005)); Gov't. Br. at 38. Petitioners are wrong. To be sure, prisons do exert "unparalleled control" over inmates because "[t]he very object of imprisonment is confinement." *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003). However, it is precisely because of that "control," and the responsibilities that go with it, that this Court has long recognized that operating a prison is a difficult and complex task that is entitled to substantial deference. As the Court explained in *Turner* v. *Safley*, 482 U.S. 78 (1987):

> Running a prison is an inordinately difficult undertaking that requires expertise, planning and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. . . . Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

482 U.S. at 84-85. As a result, "[s]ubjecting the day-to-day judgment of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 89. Instead of strict scrutiny, the Court has looked to whether the regulation was "reasonably related to legitimate penological interests." *Id.* at 89.

This deference to prison administration has been affirmed repeatedly by the Court. In *Overton*, the Court considered whether prison regulations on family visits violated the First Amendment. In holding that the visitation rules did not violate the prisoners' rights, the Court stated: "Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain

rights inconsistent with proper incarceration." 539 U.S. at 131. Citing *Turner*, the Court found that the regulation bore a "rational relation to legitimate penological interests" and thus it "must accord substantial deference to the professional judgment of prison administrators." *Id.* at 132. Further, "[t]he burden, moreover, is not on the State to prove the validity of the prison regulation but on the prisoner to *disprove* it." *Id.* at 132 (emphasis added). *Accord O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987) (prison rules for religious practices should be accorded deference and "judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights").[2]

To be sure, the rule of deference to prison administration includes a limited exception for cases of *racial* discrimination which require a higher level of scrutiny. *See Lee* v. *Washington*, 390 U.S. 333 (1968). However, this exception—most recently reaffirmed in *Johnson* v. *California*, 125 S. Ct. 1141 (2005)—does not alter the general rule of deference to prison operations. In fact, in *Johnson*, the Court noted that *Turner* rejected strict scrutiny for prison administration generally, but simply reaffirmed the rule in *Lee* that applies strict scrutiny to racial classifications. 125 S. Ct. at 1149. The Court has never held or suggested, however, that the Fourteenth Amendment requires similar treatment of alleged discrimination based upon disability. To the contrary, the

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[2] Another recent example is *Wilkinson* v. *Austin*, 125 S. Ct. 2384 (2005), in which the Court conducted a due process analysis of the procedures for transferring an inmate to a "Supermax" facility. After recognizing the security concerns in running a prison, the Court stated that "[t]he problem of scarce resources is another component of the State's interest" and cited the annual cost of keeping an inmate in prison. *Id.* at 2397. As a result, "[i]t follows that courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior." *Id.*

Court has rejected that proposition in *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-43 (1985).

Accordingly, the argument Petitioners advance here—that prisons are generally subject to heightened scrutiny because they have "unparalleled control"—ignores established authority to the contrary. This Court has recognized that the "relationship of state prisoners and the State officers who supervise their confinement is far more intimate than that of a state and a private citizen." *Preiser* v. *Rodriguez*, 411 U.S. 475, 492 (1973). Yet except in the case of racial discrimination, prison administration has never been subjected to strict scrutiny and Petitioners cite no authority to that effect. Petitioners have not asked this Court to overrule either *Turner* or the holding of *City of Cleburne* that disability itself does not require heightened scrutiny. It follows that disabled inmates are not a suspect class because of any "control" exercised over them.

2. Petitioners also cite *dicta* in *Johnson* to argue that the deferential test of *Turner* does not apply to Eighth Amendment claims: "We judge violations of that Amendment under the 'deliberate indifference' standard, rather than *Turner's* 'reasonably related' standard." 125 S. Ct. at 1149-50. Pet'r Br. at 17; Gov't Br. at 37. Yet Petitioners fail to mention that, even if *Turner* does not apply, the deliberate indifference test is still unquestionably a high standard and does not require anything remotely approaching the kind of strict scrutiny that applies to claims of race discrimination. *See Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994) (mere negligence is not enough; there is no liability unless the prison official "knows of and disregards an excessive risk to inmate health or safety"). Indeed, to our knowledge, this Court has never intimated that Eighth Amendment claims are subject to strict scrutiny. To the contrary, this Court's Eighth Amendment decisions have been mindful of the same difficulties of prison administration that call for judicial restraint and deference.

For instance, in *Farmer*, this Court recognized that a prison official's duty under the Eighth Amendment includes ensuring "reasonable safety," which "incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions'." *Id.* at 844-45 (quoting *Spain* v. *Procunier*, 600 F.2d 189, 193 (9th Cir. 1979) (Kennedy, J.)). Similarly, in *Rhodes* v. *Chapman*, 452 U.S. 337 (1981), the Court held that housing two inmates in a cell did not violate the Eighth Amendment. The Court further found that such "considerations properly are weighed by the legislature and prison administration rather than by a court" and that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Id.* at 338, 349 n.14. Thus, even if the *Turner* test itself does not apply, the standard for Eighth Amendment claims remains high, and those claims have never been subject to heightened scrutiny.

3. As to rights besides the Eighth Amendment, Petitioners' argument that these should receive the same heightened scrutiny as in *Lane* overlooks the fundamental difference that the rights in *Lane* were not asserted in prison. Moreover, settled precedent directly forecloses heightened scrutiny for any of the hypothetical claims Petitioners assert.

First, Petitioners attempt to implicate the access to the courts that was the focus in *Lane* by reference to prison law libraries. But this argument is completely at odds with *Lewis* v. *Casey*, 518 U.S. 343 (1996). In *Lewis*, the Court considered an injunctive order that purported to ensure "access to the courts" by mandating detailed procedures for operating a prison law library. *Id.* at 346-47. The Court reviewed the order in light of the deferential *Turner* standard and found it to be "inordinately—indeed, wildly—intrusive." *Id.* at 361-62. Nowhere in *Lewis* did the Court suggest that access to the library should be determined under a standard of heightened scrutiny.

Petitioners also argue for a more searching review based on Petitioner's unknown religious practices. But that contention is foreclosed by *O'Lone*. There, the Court considered the regulation of *actual* religious practices and held that it was error to subject the prison officials to a higher level of scrutiny, especially one that reversed the burden of proof: "By *placing the burden on prison officials* to disprove the availability of alternatives, the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators." 482 U.S. at 350 (emphasis added).

Finally, Petitioners contend that due process concerns are also at issue. Pet'r Br. at 43, 49. But that argument cannot survive decisions such as *Wilkinson*. There, the Court declined to employ heightened scrutiny when considering the procedures for transferring inmates to a "Supermax" facility and again recognized the deference owed to the decisions of prison administrators. 125 S. Ct. at 2397.

In sum, Petitioners' attempt to invoke heightened scrutiny for any of the constitutional rights they assert in the prison setting—real or hypothetical—runs directly contrary to settled precedent of this Court.

4. That failure-which is the key difference between this case on the one hand, and *Lane* and *Hibbs* on the other-fundamentally changes the way in which the record of alleged violations must be read. In *Lane* and *Hibbs*, where the rights at issue were subject to heightened scrutiny, it was arguably reasonable for the Court to assume a pattern of *actual* constitutional violations based upon a pattern of *alleged* violations. After all, if the burden is on the State to justify a disparity that has been alleged by counsel or a party subject to the good-faith requirements of Fed. R. Civ. P. 11 (or similar state rules), it is reasonable to infer that those alleged disparities will actually represent constitutional violations in a reasonable percentage of cases.

On the other hand, where by the nature of the claim the State is entitled to a "presumption of correctness," and the burden is upon the *claimant* to prove that an alleged disparity not only exists but is not justified under the law (*i.e.*, is not reasonably related to legitimate penological goals or is the result of deliberate indifference), such inferences are not reasonable. Indeed, a State may well have been subject to numerous allegations of that sort and yet have *never* violated the Constitution in its treatment of a disabled inmate. Thus, at least in the prison context, a congressional finding of a "history and practice" of constitutional violations cannot be based upon mere allegations. It must be based upon *proven* violations. Moreover, it must be based not merely on the "existence" of some state conduct, but upon "a widespread pattern." *Hibbs*, 538 U.S. at 735 (citing *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 90 (2000)).

B. The Record Of Arguably Proven Constitutional Violations Over Several Decades Available To Congress In 1990 Does Not Establish A Pattern Of Violations, Especially In Relation To The Overall State Prison Population.

Petitioners here have utterly failed to establish such a pattern. Petitioners have assembled what at first glance appears to be an impressive array of judicial decisions—some 150—between the two of them. Pet'r Br. at 26-36; Gov't Br. at 30-32 & Addendum A. Yet when judged by proper standards of what "counts" as a violation, and therefore what is properly included in a record of what Congress "responded to," the mass of even arguably relevant examples shrinks dramatically. And when those examples are considered on a state-by-state basis, and in relation to the State prison population in 1990 when Congress acted, it becomes apparent that no "widespread history and pattern" of unconstitutional treatment was ever established as a predicate for the abrogation of State sovereign immunity from inmates' suits under Title II.

1. Petitioners have relied upon entire categories of anecdotal evidence that have no bearing on the issue, in addition to cases in which a violation was only alleged and never even arguably established. The first category consists of violations allegedly occurring *after* the ADA was passed. Logically, Congress can only act "in response to" a widespread pattern based on a record existing *at the time it acted*. *See, e.g., Garrett*, 531 U.S. at 368; *Hibbs*, 538 U.S. at 730 ("According to evidence that was *before* Congress when it enacted the [Family Medical Leave Act]. . . .") (emphasis added).

Petitioners also rely heavily upon actions allegedly occurring in county jails. Yet abrogating the sovereign immunity of the States requires evidence of violations by the States themselves. In *Garrett*, the Court made explicit what had been implicit in earlier cases—that Congress must identify a pattern of constitutional violations by States themselves rather than "units of local governments." 531 U.S. at 368-69.

To be sure, in *Lane*, the Court expanded the record to include local governments. But it did so only because that case "concern[ed] the provisions of judicial services, an area in which local governments are typically treated as 'arm[s] of the State' for Eleventh Amendment purposes." 541 U.S. at 527 n.16 (alteration in original). This case, however, does not involve courthouses, and Petitioners' sweeping statement that county jails are "arms of the state" for Eleventh Amendment purposes is not accurate. Pet'r Br. at 22-23 n.7; Gov't Br. at 18 n.19. In fact, county jails often do *not* have Eleventh Amendment immunity and the test turns on an examination of state law and the function being performed.[3]

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[3] *See, e.g., S.J.* v. *Hamilton County*, 374 F.3d 416, 424 (6th Cir. 2004) (concluding that a "juvenile training facility" was not an arm of the state and not entitled to Eleventh Amendment immunity); *Alkire* v. *Irving*, 330 F.3d 802, 811 (6th Cir. 2003) ("It is clear that Holmes County [Ohio] (and Sheriff Zimmerly as an officer of Holmes County) is not an arm of the state that is entitled to Eleventh

Therefore, Petitioners' broad-brush reliance on county jail cases is improper.

2. When judged by the standards of what is properly included in a record of what Congress "responded to,"—namely, actual violations by the States before the ADA—the Petitioners' mass of citations ceases to be anything resembling a widespread pattern. In fact, as the appendix to this brief shows, for 25 of the States there simply is *no* record of any arguably established violations from the Petitioners' case citations. Georgia is one of those 25. Even if violations by local and county governments are added (and they should not be), there are at most only 40 arguable violations of the rights of disabled prisoners, and even then 21 States have no record of any established violations.

Assuming Congress had reviewed these 40 cases before passing the ADA—and there is no indication that Congress

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Amendment immunity."); *Richman* v. *Sheahan*, 270 F. 3d 430, 440 (7th Cir. 2001) (noting that "Under Illinois law, sheriffs are classified as county, not state, officials, and when the sheriff 'performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official' and the Eleventh Amendment does not apply" and holding that the sheriff is not entitled to immunity for "failure adequately to train and supervise the deputies in deliberate indifference to the plaintiff's rights"); *Streit* v. *County of Los Angeles*, 236 F.3d 552, 555 (9th Cir. 2001) (holding that the Los Angeles County Sheriff's Department "acts for the County in its capacity as the administrator of the Los Angeles County jails" and was not entitled to immunity as an arm of the state); *see also Abusaid* v. *Hillsborough County Bd. of Coounty Comm'rs*, 405 F.3d 1298, 1304 (11th Cir. 2005) (noting that its precedent prior to 2003 (when the ADA was enacted) had "established definitively" that Florida Sheriffs were not entitled to Eleventh Amendment immunity for their actions). Petitioners also include two District of Columbia cases; however, the District of Columbia is not entitled to Eleventh Amendment immunity. *See CSX Transp., Inc.* v. *Williams*, 406 F.3d 667, 674 n.7 (D.C. Cir. 2005) (per curiam).

did—abrogating the sovereign immunity of all 50 states and Puerto Rico cannot in any sense of the word be considered a congruent or proportional "response." In that regard, it is telling that Petitioners offer only two states that have more than a single court finding of a violation prior to the ADA. And even these cases involved preliminary injunctions and touch only tangentially upon disabled inmates when addressing prison conditions generally.

The citations are especially revealing, moreover, considering the population of disabled inmates, coupled with the fact that prisoners are prolific litigators.[4] In 1990 alone, there were more than 700,000 prisoners in state facilities. United States Dep't of Justice, Bureau of Justice Statistics, *Bulletin: Prisoners in 1996* (June 1997), http://www.ojp.usdoj.gov/ bjs/pub/pdf/p96.pdf. Of these, approximately one-third likely could claim some disability. See United States Dep't of Justice, Bureau of Justice Statistics, *Special Report, Medical Problems of Inmates, 1997* (Jan.2001), http://www.ojp.usdoj.gov/bjs/pub/pdf/mpi97.pdf (noting that "nearly a third of State inmates . . . reported having some physical impairment or mental condition"). Accordingly, the violations per inmate are, even with arguable violations, a small fraction of one percent even for States that have reported violations.[5] *See Garrett*, 531 U.S. at 370 (noting that Congress assembled minimal evidence in light of the fact that 43 million Americans are disabled and

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[4] *Witzke* v. *Femal*, 376 F.3d 744, 750 (7th Cir. 2004) ("Prisoners often have an abundance of time, while facing a restricted number of enjoyable activities with which to pass the time other than filing federal suits."); *Kerr* v. *Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) ("Congress deemed prisoners to be pestiferous litigants because they have so much free time on their hands and there are few costs to filing suit.").

[5] Even these percentages are almost certainly overstated because they assume that *all* of the arguably established violations involved inmates who were imprisoned when the ADA was enacted.

that States employed 4.5 million people). If the requirement of a "widespread pattern" is to retain its meaning, it is not satisfied by some 40 cases among 50 States and Puerto Rico over decades of prison operations.

3. Further, Petitioners' citations of Congressional testimony from earlier legislation hardly indicates it was part of the record Congress was responding to in passing the ADA. Petitioners cite an array of earlier legislation and related testimony going back to the late 1960s and 1970s. Pet'r Br. at 21-25; Gov't Br. at 19-27. But the few scattered statements alluding to constitutional violations during hearings decades earlier were not provided or even referenced in the legislative history of the ADA.

Even the few citations of the ADA legislative history that Petitioners offer, *see* Pet'r Br. at 26, only reinforce that the ADA was *not* enacted to remedy Fourteenth Amendment concerns. The citations demonstrate instead that the ADA seeks to "break down barriers," "integrate" the disabled and end "discriminatory" treatment of the disabled with little, if any, reference to constitutional violations or irrational discrimination. *See Garrett*, 531 U.S. at 368 (requiring the legislative record to "identify a pattern of irrational state discrimination in employment against the disabled"). "[H]ad Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings. There is none." *Garrett*, 531 U.S. at 371.

Similarly, most of the statutes cited by Petitioners do not give any indication they are targeted at preventing *unconstitutional* treatment of the disabled, let alone unconstitutional treatment in state prisons. *See Kimel*, 528 U.S. at 90 (the "study does not indicate that the State had engaged in any *unconstitutional* age discrimination") (emphasis in text). On the contrary, taken as a whole, the statutes are concerned with discrimination against the disabled generally. *See, e.g.*, Section 504 of the Rehabilitation

Act 1973, Pub. L. No. 93-112, 87 Stat. 394 (expanding, *inter alia*, vocational rehabilitative services, employment opportunities, rehabilitative services and rehabilitative training); Act of June 10, 1948, ch. 434, 62 Stat. 351 (prohibiting employment discrimination by the United States Civil Service).[6] But as intractable as that problem may be,

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[6] *See also* Architectural Barriers Act of 1968, 42 U.S.C. § 4151 *et seq.*, Pub. L. 90-480 (requiring buildings financed with government funds be handicapped accessible); Education of the Handicapped Act, Pub. L. No. 91-230, tit. VI, 84 Stat. 175 (reenacted in 1990 as the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*) (noting that its purpose is to "provide for the education of all children with disabilities" among other goals); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq., repealed by* Pub. L. 106-402, Title IV, § 401(a), which enacted 42 U.S.C. § 1501 *et seq.* ("The purpose of this subchapter is to assure that individuals with developmental disabilities and their families participate in the design of and have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs authorized under this subchapter...."); Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee *et seq.* ("[T]o promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections."); Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (prohibiting air carriers from discriminating based on disability); 42 U.S.C. § 1437f ("For the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of this section."); Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, § 10, 97 Stat. 1367; Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 (discrimination in the sale of rental housing); *cf.* Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 ("[T]o ensure that the rights of individuals with mental illness are protected"); Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 349 (1980) ("An Act to authorize actions for redress

"discrimination" generally has never been synonymous with unconstitutional conduct, especially outside the race context. *See Garrett*, 531 U.S. at 370. In contrast to the heightened scrutiny in *Hibbs* and *Lane*, the rights at issue do not implicate such scrutiny, and a pattern cannot be established with bare assertions of discrimination.

II. Even Assuming Some Pattern Of Violations Had Been Established, The Imposition of A Blanket Abrogation Of Sovereign Immunity, And its Extension To All States Regardless Of Their History, Is Not a Congruent and Proportional Response.

Even if the record before Congress were sufficient to establish some "history and pattern" of unconstitutional action–which it is not–Petitioners must still establish that Congress' response was "congruent and proportional" to any pattern established by the record. Here, Congress' decision to impose a blanket abrogation of sovereign immunity was *not* congruent or proportional even as to the States in which constitutional violations–limited in number as they are–were arguably established in the legislative record. And that decision was even more indefensible as applied to the many States in which *no* violation was established.

A. Congress' Use of the ADA to Abrogate A State's Sovereign Immunity In Response To At Most A Handful Of Arguably Established Violations Over Several Decades Is Not a Congruent and Proportional Remedy.

"Regardless of the state of the legislative record," Congress may overstep its remedial authority if the legislation is "so out of proportion to a supposed remedial or preventive

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in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.").

object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior" or if it "appears, instead, to attempt a substantive change in constitutional protections." *Boerne*, 521 U.S. at 532. In deciding whether § 5 legislation attempts a change in the constitutional protections, the Court looks to whether it "erects protections beyond the Constitution's requirements" or "redefine[s] the States' legal obligations." *Kimel*, 528 U.S. at 86, 88.

1. On its face, Title II is designed to do far more than remedy or deter constitutional violations. Section 12132 of Title II states that "no qualified individual" shall be "excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." The regulations to carry out this mandate are equally wide-ranging. *See, e.g.*, 28 C.F.R. § 35.130(b) (listing prohibitions against discrimination in an "opportunity to participate" (*id.* (b)(1)(i)), those that are "not equal," (*id.* (ii)), those that are "not as effective" or fail to "reach the same level of achievement" (*id.* (iii)), those that "perpetuate discrimination" (*id.* (v)), that "limit" the "enjoyment" of any right (*id.* (vii)). As the regulations make clear, "Title II addresses *all* prison services, programs and activities—and goes well beyond the basic, humane necessities guaranteed by the Eighth Amendment—to disabled prisoners." *Miller* v. *King*, 384 F.3d 1248, 1274 (11th Cir. 2004). Thus, the all-encompassing nature of Title II "imposes substantially higher burdens" on the state prisons than would be required under either the Eighth Amendment or the *Turner* standard. *Kimel*, 528 U.S. at 87.

The same is true for any of the other rights invoked by Petitioners; Title II creates demands that are far more numerous and higher than are required by the Constitution. Indeed, while the goals of the ADA are worthy, Title II is a poorly tailored and awkward tool to accomplish the enforcement of constitutional rights. For example, though

most of the cases the Petitioners cite in an effort to establish a "pattern and history" concern prison conditions generally; the ADA says nothing of the basic conditions of a prison. It does not mandate sanitary facilities, adequate nourishment, clothing, space, staffing, freedom from unduly harsh punishment, the existence or access to a law library or exercise of religious practices. Instead, Title II would impose money damages on States for a failure to provide innumerable services, programs or activities-all of which go far beyond constitutional rights. *See Cochran* v. *Pinchak*, 401 F.3d 184, 192-93 (3d Cir.) (holding that Title II did not abrogate sovereign immunity for lawsuit seeking money damages for failure to provide blind inmate with, among other things, a tape player and "talking watch": "[Title II] affects far more state prison conduct and prison services, programs and activities than the Equal Protection Clause protects."), *vacated en banc*, pending resolution of this case, 412 F.3d 500 (3rd Cir. 2005).

Thus, Title II is not tailored to enforce constitutional guarantees of disabled inmates; it is far more sweeping—nothing less than a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). And therefore, because Title II applies indiscriminately to all services, programs and activities in state prisons, it cannot in sense be considered "targeted" to enforcing constitutional rights. *Cf. Hibbs*, 538 U.S. at 970 ("Unlike statutes in *City of Boerne*, *Kimel* and *Garrett*, which applies broadly to every aspect of state employer's operations, the FMLA is narrowly targeted...."). It follows that the imposition of financial liability for a State's *failure* to comply with those standards also is not sufficiently "targeted."

Further, the standards for liability under the Eighth Amendment versus Title II are vastly different. The deliberate indifference test is a high standard requiring actual knowledge of a substantial risk. *Farmer*, 511 U.S. at 835-36; *see also, Hernandez* v. *Texas Dept. of Pro. & Reg. Serv.*,

380 F.3d 872, 882 (5th Cir. 2004) (deliberate indifference imposes a "high burden" involving proof of an "intentional choice"). On the other hand, Title II claims do not contemplate anything approaching the high burden required under the Eighth Amendment and may be based on unintentional conduct. *See Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 909 (6th Cir. 2004) (noting that a claim for "reasonable accommodations" under 28 C.F.R. § 35.151 is not limited to "intentional discrimination"). Thus, applying Title II to State prisons--with the attendant abrogation of sovereign immunity--as a way of redressing Eighth Amendment violations would be a classic case of legislation redefining substantive constitutional law.

2. To be sure, Petitioners argue that Title II does not require a public entity to take steps that would "fundamentally alter" a facility or service or cause an "undue financial" burden. Pet'r Br. at 40; Gov't. Br. at 10, 48. Yet they fail to mention that the Title II regulations themselves place the burden on the *States* to prove that they qualify for such exemptions. *See* 28 C.F.R. § 35.130(b)(7) (reasonable modification required "unless public entity can demonstrate" that modifications would fundamentally alter a service, program or activity); *id* § 35.150(a)(3); *id* 35.164 ("public entity has the burden of proving" that compliance "would result in such alteration or burden"). And if they do not do so, they lose their sovereign immunity as to claims challenging the configuration of their facilities!

Accordingly, when considering whether the line has been crossed between enforcing constitutional rights to rewriting them, the fact that Title II places the burden of proof on the State highlights again that it supplants well-settled constitutional law with its own far-reaching mandate for regulating prison conditions. That contrasts sharply with the rule that prisoners alleging Eighth Amendment violations have the high burden of proving "deliberate indifference"; the State has no burden to disprove that allegation. *Chandler* v. *Crosby*, 379 F.3d 1278, 1289-90 (11th Cir. 2004) (holding

that a prisoner must prove all elements of his Eighth Amendment claim).

The same is true of the other hypothetical claims asserted by Petitioners, which are governed by the even more deferential "reasonably related" test of *Turner*. As this Court reaffirmed in *Overton*, the burden is on the inmate to establish the invalidity of prison conditions. 539 U.S. at 132; *see also O'Lone*, 482 U.S. at 350 (error to place burden on State for rules regulating religious practices). Yet, again, to the extent Title II is designed to "enforce" constitutional rights, it creates what amounts to a presumption that a State prison violates the constitutional rights of disabled inmates whenever the prison fails to comply with all of Title II's detailed standards.

In this regard, Title II is similar to Title I, which was at issue in *Garrett*. There, the Court focused on the fact that Title I placed the burden on the States to show the reasonableness of accommodations in employment "instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision." 531 U.S. at 373. As a result, placing the burden on the States "would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*." 531 U.S. at 373-74. Similarly in *Kimel*, the Court held that the Age Discrimination in Employment Act ("ADEA") fundamentally altered equal protection jurisprudence so that it "effectively elevated the standard for analyzing age discrimination to heightened scrutiny." 528 U.S. at 88. By the same reasoning, to impose Title II on every corner of prison life would be to replace the *Turner* and *Farmer* standards for weighing the constitutionality of prison conditions with a new regime embodied in Title II and its regulations.

3. Abrogating sovereign immunity so that States can be sued for money damages is also unnecessary and out of proportion to enforcing any of the constitutional rights at issue. First, inmates have long filed civil rights suits under

28 U.S.C. § 1983 to enforce the same constitutional rights that Petitioners argue should now be enforced by a money damages remedy under the ADA. There is no finding in the ADA—and Petitioners offer no convincing evidence to the contrary—that civil rights suits have been inadequate to redress the constitutional rights of disabled inmates. In fact, as the court of appeals below held, Petitioner may seek relief under § 1983 for the Eighth Amendment claims he has preserved.

Further, including a money damages remedy for prison litigation is a reason for special concern. It is well recognized that prisons provide a unique environment for spawning litigation. *See Roller* v. *Gunn*, 107 F.3d 227, 234 (4th Cir. 1997) ("[T]here has been a far greater opportunity for abuse of the federal judicial system in the prison setting."). In fact, "in 1995, prisoners brought over 25% of the civil cases filed in federal district courts." *Id.* at 230 (citing Administrative Office of the United States Courts statistics).

Petitioners contend that the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, tit. VIII, provides "protection" to States in this regard. Pet'r Br. at 42. However, this facile assurance about the efficacy of the PLRA overlooks that even assuming it has slowed the growth of such suits, the same conditions that have driven prison litigation in the past and have made prisoners more litigious than the rest of society still exist today. *See, e.g., Nagy* v. *FMC Butner*, 376 F.3d 252, 255-56 (4th Cir. 2004) (PLRA's deferred payment scheme not a "panacea").[7]

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[7] It is not necessary to look any further than the Petitioner in this case for a compelling example of the ongoing potential for vexatious prison litigation. According to the record, Petitioner has filed some 60 lawsuits against the State of Georgia and had five appeals dismissed by the Eleventh Circuit as frivolous. Resp't Br. in Opp'n to Pet. for Cert. at 1-2 n.1. And, although Petitioner raises access to the courts as a reason for abrogating States' sovereign immunity, Pet'r Br. at 16-17, after 60 lawsuits and five appeals, he fails to explain how he was denied access to the courts.

Thus, while the necessity for adding a money damages remedy under the ADA is dubious, the practical effect of this remedy is very real. It will spur more prison litigation at significant expense to the States. This only reinforces the point that a money damages remedy for any deviation from Title II is greatly disproportionate to enforcing the constitutional rights at issue.

B. Abrogating The Sovereign Immunity Of States With No Arguably Demonstrated Violations Is Certainly Not A Congruent And Proportional Response To A Handful Of Arguably Proven Violations In Other States.

In all events, the fact remains that there is simply *no* record of any constitutional violations for many states. As shown above and in the attached table, even if local and county governments are included, 16 of the States had no *alleged* constitutional violations prior to the ADA.[8] And if cases involving county or city jails are excluded, as well as cases involving allegations that were never arguably established, half the States—25 of them—had not been shown to have engaged in *any* violations of the rights of disabled prisoners prior to the ADA's passage. It drains the test of any meaning to find that it is "congruent and proportional" to take away

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[8] An additional indication that the ADA's uniform and sweeping requirements are neither congruent nor proportional is the Government's acknowledgement that "[b]etween 1980 and the enactment of Title II of the Americans with Disabilities Act in 1990, Department of Justice investigations under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, found unconstitutional treatment of individuals with disabilities in correctional facilities in thirteen different States." Gov't Br.; Addendum B. Even when the Government includes findings *after* the passage of the ADA it still can only assert that 33 States have been subject to negative findings. *Id.* It is again clear that Congress made no effort to limit the ADA's intrusions to the alleged harm at issue.

sovereign immunity from a group of States for which there is no evidence of violations.

In *Kimel*, the Court made essentially the same point: "Even if the California report had uncovered a pattern of unconstitutional age discrimination in the States' public agencies at the time, it nevertheless would have been insufficient to support Congress' extension of the ADEA to *every State in the Union.*" 528 U.S. at 90 (emphasis added).

Congress, moreover, has proven that targeting even the most intractable constitutional violations can be accomplished without indiscriminately applying a remedy to all States. In fact, in *Garrett*, the Court found that "[Title I's] constitutional shortcomings are apparent when the [ADA] is compared to Congress' efforts in the Voting Rights Act of 1965." 531 U.S. at 373. With the Voting Rights Act, even with a record showing almost a century of denying African-Americans equal voting rights, Congress still enacted a proportional response targeted only at offending states. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966) (noting that the Voting Rights Act was "aimed at areas where voting discrimination has been most flagrant" and that the Act "included a formula defining the States and political subdivisions to which these new remedies appl[ied]"); *see also Boerne*, 521 U.S. at 525 (noting that the provisions at issue in *Katzenbach* were confined to those regions of the country "where voting discrimination ha[d] been most flagrant" and that the remedy affected a discrete set of laws); *accord City of Rome* v. *United States*, 446 U.S. 156, 177 (1980) (approving legislation limited to "jurisdictions with a demonstrable history of intentional racial discrimination in voting"); *Civil Rights Cases*, 109 U.S. 3, 14 (1883).[9] On the other hand, when

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[9] In the *Civil Rights Cases*, the Court found a portion of the Civil Rights Act to be invalid by noting that

> [i]t does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies

Congress has failed to tailor its remedy to the offending States, this Court has found that Congress exceeded its authority. *See United States* v. *Morrison*, 529 U.S. 598, 626-27 (2000) (holding that the statute at issue there was "different from these previously upheld remedies in that it applies uniformly throughout the Nation" even though "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.").

Rather than imposing a remedy targeted at offending States, as Congress has done in the past, Title II imposes broad, pervasive requirements on every State in the Union-regardless of that State's own record with respect to disabled prisoners. The contrast in proportionality between the remedies in the Voting Rights Act and those in Title II is, as the Court said in *Garrett*, "stark." 531 U.S. at 374. Accordingly, Title II cannot in any sense be considered a "congruent and proportional" response to violations of the rights of disabled inmates in all state prisons.

* * * * *

Requiring legislation to be proportional ensures both that § 5 legislation is actually remedial while at the same time protecting the sovereign interests of each State. Claiming that a State has a pattern and history of constitutional

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> equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

Civil Rights Cases, 109 U.S. 3, 14 (1883).

violations is "a most serious charge", *Garrett*, 531 U.S. at 375, (Kennedy, J. concurring), and imputing the violations of one State to another undermines our system of dual sovereigns. Under our system, each State has its own unique sovereign identity, and abrogating a right of sovereignty that is guaranteed by an amendment to the Constitution should be based on more than "guilt by association." *Hibbs*, 538 U.S. at 741-42 (Scalia, J., dissenting). Congress' use of its remedial § 5 authority cannot be considered either congruent or proportional as to those States with no history or pattern of constitutional harm. Nor can it be so considered even as to States with a limited "history" of arguable violations, where as here that history falls far short of a "widespread pattern."

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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Appendix A: Alleged And Arguable Pre-ADA Violations By State*

State	Alleged State & Local Violations	Arguable State & Local Violations	Arguable State Violations	Arguable Local Violations	State Prison Pop. 1990	State Disabled Prison Pop. 1990 (est.)	Maximum Alleged Violations As Percent Of Disabled Pop.	Maximum Arguable Violations As Percent Of Disabled Pop.
AL	3	2	2	0	15,665	5,222	.057	.038
AK	0	0	0	0	2,622	874	0	0
AZ	3	1	1	0	14,261	4,754	.063	.021
AR	1	1	1	0	7,322	2,441	.041	.041
CA	1	0	0	0	97,309	32,436	.003	0
CO	1	1	1	0	7,671	2,557	.039	.039
CT	1	1	1	0	10,500	3,500	.029	.029
DC	2	2	2	N/A	3,471	1,157	.173	.173
DE	0	0	0	0	9,947	3,316	0	0
FL	2	2	0	2	44,387	14,796	.014	.014
GA	1	0	0	0	22,411	7,470	.013	0
HI	0	0	0	0	2,533	844	0	0
ID	1	1	1	0	1,961	654	.153	.153
IL	1	1	1	0	27,516	9,172	.011	.011
IN	2	1	1	0	12,736	4,245	.047	.024
IA	1	1	1	0	3,967	1,322	.076	.076
KS	1	1	1	0	5,775	1,925	.052	.052
KY	2	2	1	1	9,023	3,008	.066	.066
LA	1	1	1	0	18,599	6,200	.016	.016
ME	0	0	0	0	1,523	508	0	0
MD	1	1	1	0	17,848	5,949	.017	.017
MA	0	0	0	0	8,345	2,782	0	0
MI	1	1	1	0	34,267	11,422	.009	.009
MN	0	0	0	0	3,176	1,059	0	0
MO	1	0	0	0	14,943	4,981	.020	0
MS	0	0	0	0	8,375	2,792	0	0
MT	0	0	0	0	1,425	475	0	0
NE	1	1	1	0	2,403	801	.125	.125
NV	0	0	0	0	5,322	1,774	0	0
NH	1	1	1	0	1,342	447	.224	.224
NJ	1	0	0	0	21,128	7,043	.014	0
NM	1	1	1	0	3,187	1,062	.094	.094
NY	6	4	4	0	54,895	18,298	.033	.022
NC	0	0	0	0	18,411	6,137	0	0
ND	0	0	0	0	483	161	0	0
OH	1	0	0	0	31,822	10,607	.009	0
OK	1	1	1	0	12,285	4,095	.024	.024
OR	1	1	0	1	6,492	2,164	.046	.046
PA	2	2	1	1	22,290	7,430	.027	.027
PR	2	2	2	0	N/A	N/A	N/A	N/A
RI	1	1	1	0	2,392	797	.125	.125
SC	1	1	1	0	17,319	5,773	.017	.017
SD	0	0	0	0	1,341	447	0	0
TN	1	1	0	1	10,388	3,463	.029	.029
TX	1	1	1	0	50,042	16,681	.006	.006
UT	2	1	0	1	2,496	832	.240	.120
VT	0	0	0	0	1,049	350	0	0
VA	0	0	0	0	17,593	5,864	0	0
WA	0	0	0	0	7,995	2,665	0	0
WV	1	1	1	0	1,565	522	.192	.192
WI	1	1	1	0	7,465	2,488	.040	.040
WY	0	0	0	0	1,110	370	0	0
Totals	52	40	33	7	710,383	236,794	.022	.016

*This chart is derived from Petitioners case citations and relates to the addendum to Respondent's brief analyzing the pre-ADA cases. This chart does not include any federal facilities.